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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ARMANDO CHAVARRIA, Defendant and Appellant.	B206603 (Los Angeles County Super. Ct. No. VA099361)

THE COURT:*

Armando Chavarria (appellant) appeals following his plea of no contest to kidnapping (Pen. Code, § 207, subd. (a)[1] (count 2) with the special allegation that the victim was under 14 years old, and to committing a lewd act upon a child (§ 288, subd. (a)) (count 3). The trial court imposed the negotiated sentence of 11 years (the upper term) in count 2 and a consecutive two years (one-third the midterm) in count 3, for a total sentence of 13 years in state prison.

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* BOREN, P. J., ASHMANN-GERST, J., CHAVEZ, J.

1 All further statutory references are to the Penal Code unless otherwise indicated.

We appointed counsel to represent appellant on this appeal. After examination of the record, counsel filed an "Opening Brief" containing an acknowledgment that she had been unable to find any arguable issues. On October 15, 2008, we advised appellant that he had 30 days within which to personally submit any contentions or issues that he wished us to consider. Appellant was permitted to file a supplemental letter brief on February 2, 2009.

Since appellant pleaded no contest, the facts of the case are taken from the transcript of the preliminary hearing. The eight-year-old male victim, B., testified that appellant was working in the dental office where B.'s mother took B. in February 2007 because of a problem inside B.'s mouth. After the dentist cleaned B.'s teeth, appellant told B. to follow him into "the dark room." When they were inside, appellant closed the door. Appellant put tape over B.'s eyes and told B. to open his mouth. Appellant then put his "private part" in B.'s mouth as B. sat on a cardboard box. Appellant moved it forward and backwards "a little bit." B. could see downward under the tape and saw that appellant's pants were on the floor over his shoes. The private part felt big, and it felt like skin. Before they left the dark room, appellant "got the thing to clean your teeth" and gave it to B. B. remembered getting shots before he went into the dark room, but he did not feel "funny," dizzy, or as if he were having a dream. After B. and appellant left the dark room, B. went back to the dentist's chair, and appellant told B. to clean his teeth. B. called out to his mother, and he told her what had happened.

An information was filed on June 20, 2007, charging appellant with one count of committing a lewd act upon a child under 10 in violation of section 288.7, subdivision (b), which carries a sentence of 15 years to life. Several factors in aggravation under California Rules of Court, rule 4.421 were alleged in the information. Appellant pleaded not guilty.

On December 12, 2007, appellant entered into a plea agreement whereby he would plead no contest to one count of violating section 207, subdivision (a) and one count of violating section 288, subdivision (a). Appellant indicated that he understood the court would sentence him to a total state prison term of 13 years, consisting of 11 years on

count 2 and two years on count 3. The information was amended by interlineation to add counts 2 and 3. After being informed of the constitutional rights he was relinquishing and of the consequences of his plea, appellant entered his plea of no contest. On January 3, 2008, the trial court sentenced appellant in accordance with the plea agreement.

On March 3, 2008, appellant filed a notice of appeal in which he indicated that the appeal challenged the validity of the plea. In his request for a certificate of probable cause, appellant claimed that he was told to plead guilty to a charge of kidnapping even though kidnapping never occurred and the testimony from the victim verified that kidnapping never occurred. He would never have accepted the plea bargain had it been made clear to him that he was pleading to a kidnap charge. He also stated that he was never given an interpreter even though Spanish is his native language and his English is very limited. He also contended he was coerced by the deputy district attorney.

The trial court denied appellant's request for a certificate of probable cause. The superior court informed appellant on March 10, 2008, that, because his request for a certificate was denied, his appeal would be filed regarding only his sentence.

Appellant filed a petition for writ of habeas corpus in the superior court on April 11, 2008, on the ground that he was sentenced for kidnapping, and that this charge of kidnap was only introduced at the time of sentencing on a single charge of section 288. He also argued that he was not allowed the use of a Spanish interpreter even though he clearly requested one. His petition was denied. The court found he had never requested an interpreter, he was orally advised of his rights and of the consequences of his plea, and he responded appropriately in English.

In his supplemental brief, appellant now argues that the record supports "the taking of a person from his place," and not the indicated charge of kidnapping. He contends the police report, preliminary hearing, and the discussion between trial counsel and the government indicate the lesser included offense and not the charge indicated by his plea.

Appellant also contends that his trial counsel did not communicate with him about the proposed negotiated plea, except to say that it was on the table. Counsel did not explain his options to him or the consequences of the plea.

Finally, appellant argues he did not have the opportunity to address mitigating factors with the court or counsel. He argues that, in spite of these circumstances, he was sentenced to the statutory maximum sentence, and he believes the sentence is not proper.

As for appellant's first issue, the record clearly shows that appellant's contention is without merit. His claim that he was guilty only of a lesser included offense to kidnapping appears to be an attempt to fit within one of the exceptions to the requirement that he obtain a certificate of probable cause. As stated in *People v. Buttram* (2003) 30 Cal.4th 773, 780 (*Buttram*), "two types of issues may be raised on appeal following a guilty or nolo plea without the need for a certificate: issues relating to the validity of a search and seizure, . . . , and issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed."

Appellant's plea to the kidnapping charge was part of his negotiated plea, and no determination as to the degree of his crime remained to be made at sentencing. The prosecutor asked appellant before taking his plea to confirm that they had "had a discussion previously regarding these charges, the consequences of these charges, as opposed to the 288.7," and appellant confirmed this fact. Appellant replied clearly and without hesitation to all the prosecutor's questions during the taking of the plea. There is no doubt that appellant was fully aware of the offenses to which he was pleading, including kidnapping. Appellant also signed and initialed the plea form indicating that he wished to plead guilty to kidnapping, which carried a maximum sentence of 11 years. Appellant also initialed the box stating that he had a full opportunity to discuss with his attorney the facts of his case. Appellant and his counsel stipulated that there was a factual basis for his plea. Thus, the record does not support appellant's claim that he is guilty only of a lesser included offense and the related claim that his counsel did not communicate with him about the proposed plea or explain the options and consequences of the plea.

Appellant's last claim appears to challenge his upper term sentence on the kidnapping charge in that appellant states he did not have the opportunity to present "these mitigating factors" to the court or to counsel and was sentenced to the statutory maximum sentence. "These mitigating factors" appear to refer to the prior claims that he committed only a lesser included offense and that his counsel did not explain the plea to him. We have already discussed and rejected these arguments.

To the extent that appellant might be making an argument that he was improperly sentenced to the upper term on count 2 under *Cunningham v. California* (2007) 549 U.S. 270, we reject this argument also. As stated in *People v. Hester* (2000) 22 Cal.4th 290, 295, "The rule that defendants may challenge an unauthorized sentence on appeal even if they failed to object below is itself subject to an exception: Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process. [Citations.]" (See also *Buttram*, *supra*, 30 Cal.4th at p. 783.)

Appellant *did* agree to a specified sentence, unlike the defendant in *People v. French* (2008) 43 Cal.4th 36 (*French*), who entered into a plea agreement that called for a sentence of no more than 18 years for a no contest plea to six counts. (*Id*. at p. 42.) The *French* court remanded for resentencing, stating that the defendant did not implicitly admit his conduct could support the upper term by entering into a plea agreement that included the upper term as the maximum sentence. (*Id*. at p. 48.) Rather, French's type of sentencing agreement "'contemplates that the court will choose from among a range of permissible sentences within the maximum . . . .'" (*Id*. at p. 49, citing *Buttram*, *supra*, 30 Cal.4th at pp. 790-791.) *French* specifically pointed out that the defendant in that case (unlike appellant) did not agree that a specified sentence would be imposed, but only that the trial court would have discretion to impose any appropriate sentence up to the maximum. (*Id*. at p. 49.)

One of the terms of appellant's plea form was that the sentence would be comprised of 11 years plus two years on count 3. Because appellant agreed to a specified sentence both orally and on the plea form, he, unlike the defendant in *French*, was not deprived of "the opportunity to attempt to persuade the trial court to exercise its discretion to impose a lesser sentence." (*Id*. at pp. 45-46.) His arguments are without merit.

We have examined the entire record and are satisfied that appellant's attorney has fully complied with her responsibilities and that no arguable issues exist. (*People v. Wende* (1979) 25 Cal.3d 436, 441.)

The judgment is affirmed.

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